

REMARKS

The present Office Actions addresses and rejects claims 1-17. Reconsideration is respectfully requested in view of the following remarks.

At the outset, Applicants thank Examiner Swiger for extending the courtesy of a telephone interview to Applicant's undersigned representative on May 27, 2009. The Examiner agreed that the amendments submitted herewith should overcome the pending rejections. The Examiner has also agreed to call Applicant's undersigned representative should any further issues arise.

Objection to the Drawings and Amendments to the Specification

The Examiner objects to Fig. 5A because it includes reference characters ("LT" and "M") that are not defined in the specification. Accordingly, paragraph [0050] of the specification is amended to include these reference characters, thereby obviating the basis for this objection.

Amendments to the Claims

Claim 1 is amended to recite placing a spinal screw through the first pathway, the spinal screw having a percutaneous access device mated thereto, advancing the spinal screw with the percutaneous access device mated thereto along the pathway to the vertebra, and placing a fixation rod lengthwise through the pathway in an orientation substantially parallel to a longitudinal axis of the pathway. Support for this amendment can be found through the specification and in the drawings. Claims 7 and 10 are amended to correspond to amended claim 1.

Claim 11 is amended to include the limitations of claims 12 and 13, which are cancelled.

New claim 25 is added and recites the method of claim 11, wherein a percutaneous access device is coupled to the first implant as the first implant is advanced along the guide wire to the first site on the first vertebral body. Support for this amendment can be found through the specification and in the drawings.

No new matter is added.

Rejections Pursuant to 35 U.S.C. §102

Claims 1-3 are rejected pursuant to 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,741,261 of Moskovitz et al. ("Moskovitz").

As noted above, claim 1 further recites placing a spinal screw having a percutaneous access device mated thereto through the first pathway, advancing the spinal screw with the percutaneous access device mated thereto along the pathway to the vertebra, and placing a fixation rod lengthwise through the pathway in an orientation substantially parallel to a longitudinal axis of the pathway. Moskovitz does not teach or suggest the use of any spinal screws, much less a spinal screw having a percutaneous access device mated thereto. Moskovitz likewise fails to teach placing any fixation rod lengthwise through the pathway, much less in an orientation parallel to a longitudinal axis of the pathway. Moskovitz is limited to a method for separating muscles to create a channel from the skin to the spine.

Claim 1, as well as claims 2-3, therefore distinguish over Moskovitz and represent allowable subject matter.

Rejections Pursuant to 35 U.S.C. §103**Claims 4-7, 11, and 14-17**

Claims 4-7, 11, and 14-17 (claims 12 and 13 are cancelled herein) are rejected pursuant to 35 U.S.C. §103(a) as being obvious over Moskovitz in view of U.S. Publ. No. 2002/0082598 of Teitelbaum. The Examiner admits that Moskovitz "fails to teach the steps of inserting a guidewire through a lumen in the vertebra, removing a tool from the guidewire and inserting a spinal anchor, coupling a fixation element to a first anchor and performing the steps on a second anchor and guidewire." Office Action mailed March 3, 2009, pp. 3-4.

At the outset, claims 4-7 distinguish over Moskovitz for the same reasons discussed above with respect to claim 1. Teitelbaum does not remedy the above noted deficiencies as Teitelbaum likewise fails to teach delivering a spinal screw with a percutaneous access device mated thereto, nor does it teach delivering a fixation rod lengthwise through the pathway.

Dependent claim 4 and independent claim 11 further distinguish over Moskovitz and Teitelbaum because claims 4 and 11 each recite inserting a guidewire through a lumen *in the tool*, and neither

Moskovitz nor Teitelbaum teaches or even suggests inserting a guidewire *through a lumen in the blunt tip tool*. Moskovitz is only directed to a blunt tip tool, and the tool is solid and thus cannot receive any guidewire therethrough. Teitelbaum discloses the use of a guidewire, however Teitelbaum does not teach inserting the guidewire through any tool. Accordingly, neither references teaches or even suggest one limitation of the claimed invention, namely inserting a guidewire through a lumen *in the tool*.

A person having ordinary skill in the art also would never use the guidewire of Teitelbaum with the method of Moskovitz. Teitelbaum's guidewire is inserted directly through tissue and then a plurality of dilators are inserted over the guidewire to form a pathway to the spine. There is absolutely no need to use a guidewire with the method disclosed by Moskovitz as the whole purpose of separating the muscles along the muscle plane using a blunt tip tool is to *eliminate* the need to insert a guidewire and perform serial dilation. Accordingly, it would not have been obvious to combine the references.

Claims 4 and 11 therefore further distinguish over Moskovitz and Teitelbaum. Claims 5-7 and 13-17 are therefore allowable at least because they depend from claims 4 and 11.

Claim 11 further distinguishes over Moskovitz and Teitelbaum because neither reference teaches or even suggests placing a fixation element through the first pathway in an orientation substantially parallel to a longitudinal axis of the first pathway, and coupling a portion of the fixation element to the first anchor. Moskovitz does not teach the use of any fixation elements. Teitelbaum does disclose the use of a spinal rod, however the rod is not delivered through the pathway in an orientation substantially parallel to a longitudinal axis of the pathway. To the contrary, as shown in FIG. 17, the rod is delivered from a third and separate incision and it is advanced along an arced pathway so that the rod extends through the head of each screw. Claim 11, as well as claims 14-17 which depend therefrom, therefore further distinguish over Teitelbaum.

Claims 8-10

Claims 8-10 are rejected pursuant to 35 U.S.C. §103(a) as being obvious over Moskovitz in view of Teitelbaum and further in view of U.S. Patent No. 6,666,891 of Boehm, Jr. et al. ("Boehm"). The Examiner relies on Boehm to teach the use of a plurality of dilators to dilate tissue, wherein a final dilator or cannula provides access as the others are removed.

Claims 8-10 depend from claim 1 and therefore distinguish over Moskovitz and Teitelbaum for the same reasons discussed above. Boehm does not remedy the deficiencies of Moskovitz and Teitelbaum as Boehm likewise fails to teach or even suggest delivering a spinal screw with a percutaneous access device mated thereto, nor does it teach delivering a fixation rod lengthwise through the pathway.

Claims 8-10 therefore represent allowable subject matter.

Conclusion

In view of the above, Applicant believes that all claims are in condition for allowance and allowance thereof is respectfully requested.

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Respectfully submitted,

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